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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 800.

BEN W. FORTSON, as Secretary of State of the State of Georgia, and His Successor in Such Office, as Such,
Appellant,

v.

JOHN MORRIS, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

APPELLANT'S REPLY BRIEF.

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Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

APPELLANT'S REPLY BRIEF.

This Reply Brief is in three parts:

I. Reply to those arguments which were made by both appellees Morris, *et al.* and Justice, *et al.*

II. Reply to the argument made by appellees Justice, *et al.*; and

III. Reply to the argument made by appellees Morris, *et al.*[1]

[1] Page references herein to the appellees' briefs are to the printed copies thereof.

Before turning to those matters, please permit us to correct the record. After filing Appellant's Jurisdictional Statement and Brief on the Merits, we ascertained that Rhode Island and Maine require a plurality for the election of their governors. Footnote 5 on page 14 of Appellant's Jurisdictional Statement should be changed accordingly, and the states listed in appellant's Appendix "D", sec. II, should be added to sec. III of that Appendix, thus bringing to at least 38 the number of states which provide for the election of their governors by plurality vote with the state legislatures electing the governor in the event of "tie".

I. The Georgia Constitutional Provision Whereby the General Assembly Elects, From the Top Two Candidates, a Governor When No Candidate Receives a Majority, Is Not a Denial of Equal Protection.

Appellees in both camps have attempted to reargue alleged malapportionment,[2] thereby practically conceding that the District Court's order was not properly founded.

We had thought that issue had been fully litigated and laid to rest. *Fortson v. Toombs,* 379 U. S. 621 (1965), and *Toombs v. Fortson,* 384 U. S. 210 (1966). See Appellee's Motion to Affirm with Supporting Brief in *Toombs v. Fortson, Id.,* esp. pp. 4-6, 8, and 28-30.

Appellees have attempted to extend the "one person-one vote" popular vote principle into the legislature, where the "one legislator-one vote" principle necessarily is in effect, but not on a perfectly "popular" basis. *Wesberry v. Sanders,* 376 U. S. 1 (1964). Because any vote by a legislator may be against the wishes of some or all of his constituency, few legislators are popular with all of their constituents. This is a necessary result of the republican

[2] Justice's brief, pp. 5-6, 9, 10-11 and 16-17; Morris' brief, pp. 8, 12.

form of government and the reason legislators in Georgia must run for re-election every two years.[3]

Appellees complain that, in selecting a governor, a legislator may disregard the wishes of a plurality or even a majority of his constituency. This is undoubtedly true, and intentionally so. The Georgia Constitution clearly leaves each legislator free to vote for either of the top two gubernatorial candidates. What appellees have overlooked is the fact that the election of a governor by the Georgia General Assembly, under the limited circumstances prescribed by the Georgia Constitution, is not a continuation of the popular vote process of election, but is a separate method of election which comes into operation, rarely but automatically, when the voters have not given any candidate a majority. Even if the election of a governor by the General Assembly were to be considered as a continuation of the popular election process, it is not, we submit, prohibited where provided for by the State Constitution adopted by popular vote in 1945, per-

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[3] Appellees would have the Court believe that the Democrats in the Georgia General Assembly are sworn to elect the Democratic candidate for Governor (Justice's brief, pp. 7-8, 9, and 15; Morris' brief, p. 8). Actually, the Democratic "Declaration of Candidacy" merely says: ". . . I pledge myself to abide by the Rules and Regulations of the State Democratic Executive Committee and to abide by the results of said primary election of September 14, 1966" (Tr. 150, pl. ex. C), which primary was inconclusive and has passed. It goes on to say: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia" (*Id.*). That election also has passed. No legislator is pledged to support a governor after he becomes governor, and none are pledged to elect either man governor when the General Assembly convenes in January, 1967.

Appellees have lamented the fact that there are more Democrats in the General Assembly than Republicans (Justice's brief, p. 8; Morris' brief, pp. 8, 10). Seldom, if ever, is the number of members of one political party equal to the number of members of another political party in any legislature, and such a purely political factor has never before been considered in any decision, to our knowledge, by this Court in any voting rights, apportionment, or other case.

haps with the approval of some of these appellees, before the fires of politics were ignited.[4]

II. The Quick Gubernatorial Runoff Election Sought by Appellees Justice, et al., Is Not Possible Under Valid, Existing Georgia Law.

Appellees Justice, *et al.*, have asserted that the "only obstacle" to the election of a governor in a runoff election is the provision of the Georgia Constitution here under consideration.[5] "Laws, like houses, lean on one another."[6] Having focused their attention solely on the runoff code

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[4] Appellees have argued that the General Assembly could elect not the plurality winner but the man who ran second. Out of 45 presidential elections governed by the electoral college, 14 presidents have been elected who did not obtain a majority of the popular votes cast in the election. Of those, three received fewer popular votes than their major opponents. See Appendix "E", *infra*. Georgia's constitutional provision is not comparable to the electoral college. It compares with that portion of the Twelfth Amendment which transfers the class eligible to vote to the House of Representatives. Does the *Federal* Constitution in this instance impose upon the States requirements more stringent than it does upon the United States? See *Delaware v. New York*, 35 U. S. L. Week 3138 (U. S. Oct. 17, 1966). See also discussion of *Lucas v. Colorado General Assembly*, 377 U. S. 713 (1964), in Appellant's Jurisdictional Statement and Brief on the Merits, pp. 18-19.

Appellees Justice, *et al.*, suggested in their brief (p. 13) that to permit the selection of the governor by the General Assembly would challenge the "ingenuity" of those who would challenge the "ingenuity" of those who would seek to evade the Equal Protection Clause. We submit that such a statement does discredit to those who drafted and ratified the Twelfth Amendment to the Constitution, after which Georgia's constitutional provision here under consideration was patterned in part. It was ingenious of the drafters of the Twelfth Amendment to provide a system whereby its final provision would rarely be put into operation during its 150-year history—twice in the election of a president (The House of Representatives elected Thomas Jefferson in 1800, and John Quincy Adams in 1824), and once in Georgia (This is a first for Georgia). Is Georgia to be severely criticized for ingeniously following the lead of the federal government?

[5] Justice's brief, p. 4.

[6] E. Burke, *Tracts on the Popery Laws*, Pt. i, ch. 3 (1756).

section, § 34-1514,[7] those appellees have overlooked other valid provisions of the Georgia Constitution and laws, to wit: Ga. Const. Art. V, Sec. I, Par. III (Ga. Code Ann. § 2-3003); Ga. Code Sec. 34-1506 (c), and Ga. Laws 1949, 948 (Ga. Code Ann. § 40-104.1).[8]

Appellees have argued that a runoff election can be ordered "without difficulty or further delay."[9] Georgia law provides, Ga. Code Ann. § 40-104.1 (Ga. Laws 1949, 948), that the General Assembly "shall open and publish the returns of the election for governor as provided by Article V of the Constitution of the State, and shall determine all questions relating thereto. . . ."[10] For there to be an immediate runoff, it would be necessary to order that the sealed official returns be opened and to order someone other than the General Assembly to compute the vote and determine any questions relating thereto; i. e., it would be necessary to invalidate Ga. Code Ann. § 40-104.1, among others. The transmission and publication sections of Georgia's Constitution (Ga. Const. Art. V, Sec. I, Pars. III and IV; Ga. Code Ann. §§ 2-3003, 2-3004)[11] and laws [Ga. Code § 34-1506(c)],[12] have not been declared invalid by the District Court, nor have they been attacked by the appellees. Nevertheless, these appellees would invalidate the unchallenged transmission and publication sections of Georgia's Constitution and similar sections of the Constitutions of at least 23 States. See Appendix "F", *infra*.

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[7] Justice's brief, pp. 2-3, 5, 7, 8, 9, 19, 20, 21, 23 and 25.

[8] See Appellant's Jurisdictional Statement and Brief on the Merits, pp. 9, 11, 22 and Appendix "B" thereto.

[9] Justice's brief, p. 9.

[10] See Appellant's Jurisdictional Statement and Brief on the Merits, Appendix "B".

[11] See n. 10, *supra*.

[12] See n. 10, *supra*.

Appellees Justice, *et al.*, have asked this Court to construe the runoff provision of the Georgia Election Code (§ 34-1514)[13] contrary to the construction placed upon it by Georgia's Attorney General (Tr. 142, 145-148, 179; compare Justice's brief, p. 5).[14] This would be a departure from *Bell v. Maryland*, 378 U. S. 226, 237 (1964); *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 105 (1944); *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 499 (1941); *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959).

Moreover, counsel for these appellees seek to have the runoff provision of the Georgia Code construed not only "in light" of the proposed, but unadopted, 1964 constitution, which they prevented from being submitted to the voters, *Fortson v. Toombs, supra,* but as if that constitution had been submitted and adopted.[15] That *proposed* constitution called not for a runoff but for a "special election," open to any candidate,[16] in the event no gubernatorial candidate received a majority of the votes.[17] The General Assembly which adopted the Election Code, approved June 24, 1964,[18] was the same General Assembly which, at that same extraordinary session, proposed the 1964 constitution. It certainly knew the difference between a runoff election and a special election,[19] and when

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[13] Justice's brief, pp. 9, 20-24.

[14] There has been no decision by a Georgia Court involving Code § 34-1514 and hence the Attorney General's construction of it is the only existing "state authority."

[15] Justice's brief, pp. 22-23.

[16] See Ga. Code § 34-1515; Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

[17] Ga. Laws, May-June, 1964, Ex. Sess. 234 at 286, Art. 4, § 7, Par. 3; see Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

[18] Ga. Laws, May-June, 1964, Ex. Sess. 26-220.

[19] Compare Ga. Code §§ 34-1514 and 34-1515; Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

the General Assembly did not provide for a runoff gubernatorial election, it understood what it was doing. *Fortson v. Dorsey*, 379 U. S. 433, 434 n. 1 (1965).

In their reading of the runoff provision, § 34-1514, and in their effort to prevent the casting of write-in votes in a runoff, appellees Justice, *et al.*, have contended that the runoff shall be "between the two candidates receiving the highest number of votes."[20] They have overlooked the sentence in § 34-1514 which follows the one they quoted: "The candidate receiving *a majority of the votes cast* in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner" (Emphasis added). The sentence does *not* read: The candidate receiving a majority of the votes cast for the two candidates. . . . The requirement of a majority applies even to a runoff. Appellees also have overlooked the following provisions of the Georgia Election Code relating to the right to cast a write-in vote:

(1) Ga. Code § 34-1315 (d): "An elector may, at *any* election, vote for *any* person for *any* office, for which office his names does *not appear* upon the voting machine as a candidate, *by a write-in ballot*, containing the name of such person, deposited, written or affixed (but not by the use of a sticker or paster) in or upon the appropriate receptacle or device provided in or on the machine for that purpose, and in no other manner" (Emphasis added).

(2) Ga. Code § 34-1224: "In elections [at polling places where vote recorders are used], a *write-in ballot shall be provided* to permit an elector to vote for persons whose names do not appear on the ballot labels." (Emphasis and matter in brackets added.)

(3) Ga. Code, § 1322 (b): "*Any* ballot indicating a *write-in vote* for *any* person whose name is not

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[20] Justice's brief, p. 25.

printed on the ballot, *shall be counted* as a vote for such person. . . ." (Emphasis added.)

(4) Ga. Code, § 34-1505: "The superintendent, in computing the votes cast at *any* election, shall compute and certify *write-in votes* exactly as such names were written on the ballot, or deposited or affixed in or on receptacles for that purpose, and as they have been so returned by the poll officers." (Emphasis added.)

(5) See also Ga. Code, § 34-1103 (b), (c); § 34-1206 (c), (d), (g); § 34-1220 (c), (d); § 34-1326 (a), (c), (d); § 34-1327; § 34-1328 (c), (e), (f), (g); and § 34-1329.[21]

In driving toward their goal of a runoff election, appellees Justice, *et al.*, have not referred to *Gray v. Sanders, supra.* There the Court said: ". . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Ibid.* at 381. In a runoff under Ga. Code, § 34-1514, the class of voters is ". . . the electors entitled to vote in the first . . . election . . ."[22] Can Georgia, in view of *Gray v. Sanders,* deny to anyone entitled to vote in a runoff the right to cast a write-in vote? Appellees seek in Justice to deny to voters the right to

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[21] Copies of the Georgia Election Code, Title 34 of the Georgia Code, Ga. Laws May-June, 1964, Ex. Sess., 26-220, are on file in the Court.

[22] Ga. Code §-1514 provides in pertinent part as follows: "Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624." The electors entitled to vote in the "first . . . election" are those who had become registered voters on or before July 25, 1966. Ga. Code § 34-611. Ga. Code § 34-624 prohibits an elector who voted in the primary of one political party preceding a given election from voting in the primary or runoff primary of the other party for the nomination of candidates for that same election. (See Appendix "G", *infra.*)

write-in. They have said that if write-in voting were permitted in a runoff ". . . there would be no way to be sure that the runoff would accomplish its intended result of producing a majority vote for one candidate."[23] Is that not sufficient justification for Georgia's method of gubernatorial election?

If *Gray v. Sanders* applies to every election, it must apply to runoff elections, and: "Every voter's vote is entitled to be counted. . . ." *Ibid.* at 380. If *Gray v. Sanders* does not apply to every election, how can appellees argue that it applies to an election by Georgia's General Assembly?

If *Gray* does not require the counting of write-in votes in a runoff election, the reason for its inapplicability would appear to be that a runoff is a separate stage of an election, to which *Gray* is not applicable. If *Gray* does not apply to the separate runoff stage of an election, then how can it be argued that *Gray* applies to a separate legislative stage of an election?

Assuming momentarily, *arguendo*, that *Gray* permits the discounting of write-in votes in a runoff election, the problem still remains unresolved. It may be that the Georgia Constitution, or Georgia law (see pages 8-9 above) protects the right to cast a write-in vote in a runoff election. *Stewart v. Cartwright*, 156 Ga. 192, 197, 118 S. E. 859 861 (1923); *Adair v. McElreath*, 167 Ga. 294, 315-316, 145 S. E. 841, 850 (1928); *Hooper v. Almond*, 196 Ga. 52, 80, 25 S. E. 2d 778, 793-794 (1943); *Griffin v. Trapp*, 205 Ga. 176, 182, 53 S. E. 2d 92, 95-96 (1949). Thus, even if *Gray* permits the discounting of write-in votes in a runoff, it may nevertheless be necessary to count such write-in votes under the Georgia Constitution and laws, unless the Federal Constitution prohibits Georgia from permitting the casting and counting of write-in votes in a runoff election.

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[23] Justice's brief, p. 25.

Such construction of *Gray* would, we submit, abolish the majority requirement in all elections, and with it, majority rule.

On the other hand it could be contended that *Gray*, in its basic concept, prohibits the plurality system of election, on the ground that where public officials are elected by simple plurality, votes cast against the plurality winner (a majority) are unconstitutionally diluted.

It is therefore respectfully submitted that the runoff election sought by appellees Justice, *et al.*, is not the solution to Georgia's problem of electing a governor.

III. Appellees Morris, *et al.*, Are Not Entitled to a Special Gubernatorial Election.

Appellees Morris, *et al.*, seek a special gubernatorial election open to a candidate of their liking. In support of their contentions they have relied upon numerous newspaper clippings.[24]

These appellees have attempted to show by their news articles that Republicans voted in the Democratic runoff primary held on September 28, 1966.[25] They now are contending that "the apparent Republican cross-over" resulted in two votes for Republicans.[26]

Under Georgia law, party primaries are "open"; i. e., voters are not required to register as Democrats or Republicans, and any registered voter ". . . shall be entitled to vote in any primary or election . . .; provided, however, that an elector voting in the primary or pri-

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[24] Without conceding the accuracy, relevancy of admissibility of those newspaper articles, we expect to show therefrom conclusions different from those drawn by appellees, for such consideration and weight as the Court gives to appellees' news articles.

[25] Morris' brief, p. 3.

[26] Morris' brief, p. 18 and Appendix B, p. 20a.

maries held by a single party for the nomination of candidates to seek public offices to be filled in an election, shall not vote in a primary held by any other party for the nomination of candidates to seek public offices to be filled in the same such election." Ga. Code, § 34-624, Appendix "G", *infra*. See also Ga. Code, §§ 34-103 (g), 34-602, 34-609 (a), 34-612, 34-620, and 34-622.[27]

Georgia not unique in holding "open primaries"; e. g., Alaska, Michigan, Minnesota, Utah, Washington,[28] and Wisconsin.[29] Under Ga. Code, § 34-624, *supra*, a person is not allowed to vote in both the Democratic and Republican primary held to nominate candidates for the same general election, and a person who voted in the Republican primary on September 14, 1966, was prohibited by § 34-624 from voting in the Democratic runoff primary held on September 28.

If appellees Morris, *et al.*, had been dissatisfied with the outcome of the September 28, 1966, Democratic gubernatorial runoff because of some alleged "Republican cross-over" resulting in a "kind of 'one man, two vote rule' for Republicans"[30] it would appear that they should have raised that question after the Democratic runoff in September, rather than awaiting the outcome of the write-in campaign and the General Election of November 8. These appellees belatedly have requested a special election, upon alleged equitable considerations, in effect challenging the "open primary" system,[31] in a case in-

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[27] See n. 21, *supra*.

[28] Regarding the constitutionality of "open primaries", see *Anderson v. Millikin*, 186 Wash. 602, 59 P. 2d 295 (1936).

[29] See The Council of State Governments, THE BOOK OF THE STATES, 1966-1967, Vol. XVI, p. 18; and National Municipal League, COMPILATION OF THE 48 DIRECT PRIMARY SYSTEMS, 3d, 1958.

[30] Morris' brief, p. 18.

[31] See n. 28, *supra*.

volving the sole question of whether or not the General Assembly will be permitted to select a governor.

Appellees Morris, *et al.*, have contended that the declaration by the District Court that Georgia's General Assembly cannot select the governor "voids the General Election",[32] because, they say: "Georgia citizens relied upon the constitutionality of—and cast their ballots under —the Constitution of Georgia."[33] That assertion is not supported by either fact or law.

It is unsupported in fact, because, according to appellees' newspaper clippings, the threat of the instant litigation, and the predictions that the General Assembly would not be permitted to elect the governor if no candidate received a majority, preceded the November General Election like the countdown before the blastoff of a guided missile.[34] For example (Morris brief, Appendix B, pp. 60a-61a):

> WRITE-IN LAWYERS LOOK TO COURT TEST
> (Atl. Journ. 11-4-66).
>
> If no candidate for governor receives a majority of votes Nov. 8, there will be legal action unless a run-off election is held, the Lawyer's Committee of Write-In, Georgia says.
>
> • • • • • • • •
>
> He also pointed out that the current General Assembly is malapportioned and said it would thus not have the authority to elect a governor.
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> • • • • • • • •

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[32] Morris' brief, p. 15; see also pp. 7-8 thereof.

[33] Morris' brief, p. 15.

[34] See Appendix B to appellee Morris' brief, pp. 43a, 44a, 52a, 53a, 57a, 58a, 60a, 61a, 62a, 63a, 68a, 69a, 73a, 74a, 75a, 76a, and 77a.

> IF NO CANDIDATE receives a majority Nov. 8 "and a run-off is not directed for Nov. 22, the legality of such failure to call a runoff will be challenged. If this challenge is not sustained by the Courts, and the Legislature attempts to pick the governor instead of the people voting, this shall also be challenged," Mr. Jacobs declared.

In an article published in The Atlanta Journal on November 7, the Lawyer's Committee of Write-In, Georgia, again was quoted as saying that the General Assembly could not legally elect a governor. Appellee Morris' brief, Appendix B, p. 73a-75a. Thus, the voters of Georgia went to the polls on November 8 fully aware of the threat, and possible consequences, of the instant litigation. To say that they voted in reliance upon the validity of the constitutional provision here in issue is a mistake of fact.

Moreover, "A Statute which is ultimately declared unconstitutional is presumed to have been known by all to be a nullity from the time of its enactment, even though the fact of its nullity is not known until declared a long time afterward by a five to four decision." *Holland v. Atlantic Stevedoring Co.*, 210 App. Div. (NY) 129, 130, 205 N. Y. S. 397, 398 (1924); *affirmed*, 239 N. Y. 605, 147 N. E. 214 (1925). Thus, to say that the voters went to the polls on November 8 relying on the validity of the Georgia Constitution is also a mistake of law. Moreover, Georgia voters are not unaccustomed to litigation.

Appellees Morris, *et al.*, apparently have contended that they believe there would have been more write-in votes except for the fact that the thesis of the Callaway supporters was that a write-in vote was a vote for Mr. Maddox.[35] Appellees have overlooked their own newspaper articles pointing out the Maddox thesis that a write-in

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[35] Morris' brief, p. 8.

vote was a vote for Mr. Callaway.[36] Eugene Patterson explained that Maddox feared that many long-time Democrats, who would never vote for a Republican, would "write-in", thus substracting from the Democratic votes Mr. Maddox otherwise would receive.[37] [38]

Actually, the write-in movement was discouraged by people not identified with either Mr. Callaway or Mr. Maddox.[39] Retiring Fifth-District Representative Charles L. Weltner "called the 'Write-in Georgia' campaign 'a lost cause'. . ."[40] Congressman Weltner was not alone. For example:

> Alderman G. Everett Millican, who also is a former state senator, said he thought "it would be a great mistake for us to have a write-in campaign." He added: • • •
>
> "If they don't want one of these, they've got the choice of the other, and they ought to take it. Be-

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[36] Morris' brief, Appendix B, pp. 45a, 46a, 47a, 49a, 50a, 51a, 52a, 69a, 70a, 71a, 72a, 75a, 76a, and 77a.

[37] Morris brief, Appendix B, p. 46a.

[38] Appellees Morris and Robin in the case at bar are the same Morris and Robin in the case of *Morris, et al. v. Fortson,* N. D. Ga., Civil No. 19483, referred to at pages 8-9 of their brief. They are represented by the same attorneys in both suits. Their assertions (Morris' brief, p. 9) that attorneys for Write-In Georgia intend to contest the election through *Morris, et al. v. Fortson, et al.,* N. D. Ga., Civil No. 19483, would necessitate an intervention and an attack by the intervenors upon Art. V, Sec. I, Par. V, of the Georgia Constitution (Ga. Code Ann. § 2-3005), which provides that "Contested elections shall be determined by both houses of the General Assembly in such manner as shall be prescribed by law." In *Baker v. Carr,* 369 U. S. 186, 223, 231-232, 284 (1962), the Court, citing *Taylor v. Beckham* (No. 1), 178 U. S. 548 (1900), indicated that it was not the intent of *Baker v. Carr* to withdraw from state legislatures the power to determine contested gubernatorial elections.

[39] Morris' brief, Appendix B, pp. 28a-34a, 37a-39a, 44a, 45a, 62a, 63a, and 67a-69a.

[40] Morris' brief, Appendix B, p. 58a, article entitled "Write-in a Waste, Weltner Protests."

cause, generally speaking, if you write-in in order to beat one candidate, what you really do is give that candidate a better chance to be elected."

Mr. Millican said also that there was a possibility a write-in campaign could force the decision into the House of Representatives. (Morris' brief, Appendix B, p. 30a, Atlanta Journal, October 7, 1966.)

Other articles pointed out the possibility that the write-in campaign would possibly prevent either Callaway or Maddox from obtaining a majority.[41]

As early as October 10, is was reported as follows:

Some of the supporters of an Arnall write-in believe that even if a million voters turned out in the November election, Arnall could get fewer votes than he did in the primary runoff and still run second in the race, and keep either Maddox or Callaway from getting a majority of the votes. (Morris' brief, Appendix B, p. 33a).

The morning before the election, it was reported that:

Some observers now believe the race between Republican Bo Callaway and Democrat Lester Maddox will be so close that a write-in vote of at least 100,000 for Arnall would be enough to keep anyone from winning with a majority of the votes.

That eventuality opens the doors for all sorts of possibilities.

First, a suit likely would be filed to force a run-off election two weeks later to let the people decide the winner.

• • • • • • • •

Then there is the possibility that if the election is thrown into the legislature, the federal courts will rule that it is too malapportioned to decide the outcome of a governor's race. (Morris' brief, Appendix B, pp. 68a-69a.

[41] Morris' brief, Appendix B, pp. 37a-39a and 67a.

In view of the predictions of the instant litigation, one could almost say that the underlying purpose of the write-in movement was to create a situation whereby Article V, Section I, Paragraph IV, of the Georgia Constitution could be contested, with a view toward seeking a special election open to a candidate acceptable to the write-in group. Having lost the runoff Democratic Primary on September 28, they now seek a special election on the grounds that they were "misled" by the Georgia Constitution.

Appellees Morris, *et al.*, have shown no factual, legal or equitable ground for a special gubernatorial election.

CONCLUSION.

It is respectfully submitted that:

(a) The District Court erred in declaring unconstitutional any part of Article V, Section I, Paragraph IV of the Constitution of Georgia, because *Gray v. Sanders, supra,* is not applicable to it;

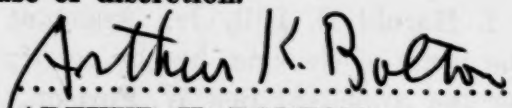
(b) The appellees are attempting to relitigate alleged malapportionment after that matter has been fully and finally adjudicated, *Fortson v. Toombs, supra,* and *Toombs v. Fortson, supra;*

(c) The appellees Justice, *et al.,* seek a runoff gubernatorial election which is not provided for by Georgia law;

(d) The appellees Morris, *et al.,* seek a special gubernatorial election to which they are not entitled;

(e) The District Court abused its discretion and erred in overlooking the mechanics and complexities of Georgia's election laws and by disrupting the election process with precipitate changes, *Reynolds v. Sims,* 377 U. S. 533, 588 (1964); and

(f) The order of the District Court should be reversed as error and as an abuse of discretion.



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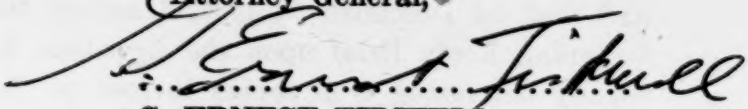

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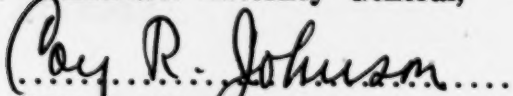

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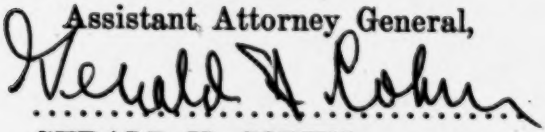

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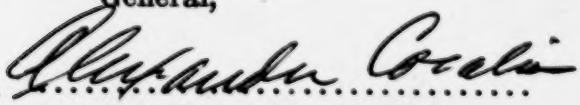

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Proof of Service.

I, Harold N. Hill, Jr., Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel for the Appellant Ben W. Fortson, Jr., that I am a member of the Bar of the Supreme Court of the United States, and that on December 2, 1966, I served the within and foregoing Reply Brief upon the Appellees herein by personally delivering true copies thereof to their Attorneys of Record, Morris Brown and Emmett Bondurant.

Harold N. Hill, Jr.,
Of Counsel for Appellant.

APPENDIX E.

"MINORITY" PRESIDENTS

Under the Electoral College system, 14 Presidents have been elected, either by the Electoral College itself or by the House of Representatives, who did not receive a majority of the popular votes cast in the election. Three of them—John Quincy Adams, Rutherford B. Hayes and Benjamin Harrison—actually trailed their opponents in the popular vote.

The following table shows the percentage of the popular vote received by candidates in the 14 elections in which a "minority" President was elected.

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The following table shows the percentage of the popular vote received by candidates in the 14 elections in which a "minority" President was elected:

Year	Elected	Opponents		
1824	Adams	Jackson	Clay	Crawford
	30.54	43.13	13.24	13.09
1844	Polk	Clay	Birnay	
	49.56	48.13	2.30	
1848	Taylor	Cass	Van Buren	
	47.35	42.52	10.13	
1856	Buchanan	Fremont	Fillmore	Smith
	45.63	33.27	21.08	.01
1860	Lincoln	Douglas	Breckenridge	Ball
	39.79	29.40	18.20	12.60
1876	Hayes	Tilden	Cooper	
	48.04	50.99	.97	
1880	Garfield	Hancock	Weaver	Others
	48.32	48.21	3.35	.12
1884	Cleveland	Blaine	Butler	St. John
	48.53	48.24	1.74	1.49
1888	Harrison	Cleveland	Fisk	Streeter
	47.86	48.66	2.19	1.29
1892	Cleveland	Harrison	Weaver	Others
	46.04	43.01	8.53	2.42
1912	Wilson	T. Roosevelt	Taft	Others
	41.85	27.42	23.15	7.58
1916	Wilson	Hughes	Benson	Others
	49.26	46.12	3.16	1.46
1948	Truman	Dewey	Thurmond	Wallace
	49.51	45.13	2.40	2.38
1960*	Kennedy	Nixon	Unpledged	Others
	49.71	49.55	.92	.27

* 1960 percentages total more than 100 because of double-counted Alabama votes (both under Kennedy and Unpledged columns). See p. 95.

Sources: Library of Congress, Historical Statistics of the U. S., and Congressional Quarterly Records

APPENDIX "F".

Some of the States Which Require That the Election Returns for the Office of Governor Be Transmitted to the Legislature.

State	Constitutional Provision
Alabama	Art. V, Sec. 115
Arkansas	Art. VI, Sec. 3
Colorado	Art. IV, Sec. 3
Delaware	Art. III, Sec. 3
Georgia	Art. V, Sec. 1, Par. III
Illinois	Art. V, Sec. 4
Indiana	Art. V, Secs. 4, 5
Iowa	Art. IV, Secs. 3, 4
Louisiana	Art. V, Sec. 2
Maine	Art. V, Sec. 3
Maryland	Art. II, Secs. 2, 3, 4
New Hampshire	Part II, Art. 42
Ohio	Art. III, Sec. 3
Oklahoma	Art. VI, Sec. 5
Oregon	Art. IV, Secs. 4, 5
Pennsylvania	Art. IV, Sec. 2
South Carolina	Art. IV, Sec. 4
Tennessee	Art. III, Sec. 2
Texas	Art. IV, Sec. 3
Vermont	Chapter 2, Sec. 39
Virginia	Art. V, Sec. 70
Washington	Art. III, Sec. 4
West Virginia	Art. VII, Sec. 3

APPENDIX "G".

Georgia Code Section 34-624.

Right of electors named on list to vote; purging lists; consolidation of lists.—Each elector whose name appears on such list, and who is not found to be disqualified subsequent to the filing of such list, shall be entitled to vote in any primary or election held during the period subsequent to the filing of such list and before the filing of the next such list; provided, however, that an elector, voting in the primary or primaries held by a single party for the nomination of candidates to seek public offices to be filled in an election, shall not vote in a primary held by any other party for the nomination of candidates to seek public offices to be filled in the same such election. It shall be the duty of the registrars to consolidate such list and any such supplemental list for any such primary or election and to make certain that no person is listed more than once. (Ga. Laws May-June 1964 Ex. Sess., 26, 64.)